IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 16, 2004 Session

STATE OF TENNESSEE v. JONATHAN WESLEY STEPHENSON

Appeal from the Circuit Court for Cocke County
No. 5012 & 5040 Ben W. Hooper, II, Judge

No. E2003-01091-CCA-R3-DD - Filed March 9, 2005

The Defendant, Jonathan Wesley Stephenson, appeals as of right his sentence of death. In 1990, he was convicted of first degree murder and conspiracy to commit first degree murder in the death of his wife. His conviction for murder was based on his role in the killing under the criminal responsibility statute. The jury sentenced the Defendant to death for the murder and the trial court imposed a consecutive sentence of twenty-five years in prison for the conspiracy. On direct appeal, our supreme court affirmed both convictions, but remanded for resentencing because of an error which nullified the jury's verdict. See State v. Stephenson, 878 S.W. 2d 530, 534 (Tenn. 1994). On remand, by agreement of the parties, the Defendant was sentenced to life without parole for the murder and to sixty years for the conspiracy. In 1998, the Defendant filed a petition for writ of habeas corpus in the Circuit Court for Johnson County in which he challenged his life sentence. On appeal, this court affirmed the trial court's dismissal of the petition. See Jonathan Stephenson v. Howard Carlton, Warden, No. 03C01-9807-CR-00255, 1999 WL 318835 (Tenn. Crim. App., Knoxville, May 19, 1999), app. granted (Tenn. Sept. 20, 1999). On further review, the Tennessee Supreme Court concluded that the Defendant's life sentence for the murder conviction was illegal because life without parole was not a statutorily authorized punishment at the time of the offense. The Court remanded the case for further proceedings. See Stephenson v. Carlton, 28 S.W. 3d 910, 912 (Tenn. 2000). After his life sentence was declared void, resentencing proceedings began in the Circuit Court for Cocke County. At the conclusion of the proof, the jury found as the sole aggravating circumstance that the "defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration." Tenn. Code Ann. §39-13-204(i)(4). The jury further found that the mitigating circumstances did not outweigh the aggravating circumstance and imposed the death penalty. The Defendant now appeals. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Carl R. Ogle, Jr., Jefferson City, Tennessee, John E. Herbison, Nashville, Tennessee, and Tim S. Moore, Newport, Tennessee, for the appellant, Jonathan Wesley Stephenson.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Angela M. Gregory, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General; and James B. Dunn, Assistant District Attorney General, for the appellee, State of Tennessee.

ISSUES

In this appeal, the Defendant challenges his death sentence and presents for this Court's review sixteen issues:

> I. Whether the combination of the Defendant's sentence of confinement for conspiracy to commit premeditated murder, plus his sentence of death, which is premised upon the sole aggravating circumstance of murder for remuneration or promise of remuneration, unconstitutionally subjects the Defendant to multiple punishments for the same conduct.
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> II. Whether the grand jury's failure to find or charge the existence of aggravating circumstances in the indictment renders the death sentence invalid under Apprendi v. New Jersey and its progeny.
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> III. Whether the trial court erroneously declined to consider the Defendant's motion to suppress his statement.
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> IV. Whether the trial court's admission of former testimony of witnesses who were not shown to be unavailable violates the right of confrontation.
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> V. Whether the trial court erroneously allowed into evidence the rifle which was alleged to have been used to kill the victim.
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> VI. Whether the trial court erroneously declined the defense motion for a mistrial upon Agent Davenport's mention of the Defendant's having stated that he was willing to take a polygraph test.
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> VII. Whether the trial court erroneously admitted testimony about a ring which the Defendant gave to his former girlfriend.
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> VIII. Whether the trial court erroneously permitted the State to inquire as to whether the Defendant had shown remorse for the death of his wife and to argue the absence of remorse to the jury.
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> IX. Whether the trial court erroneously permitted the State to appeal to vengeance by arguing that, while the Defendant's family asked the jury not to impose the death sentence, the victim's family did not get that opportunity.

X. Whether the prosecutor during closing argument improperly argued that the jury should consider which codefendant pulled the trigger only if the trial court told the jury that that is important.

XI. Whether the trial court erroneously instructed the jury as to victim impact evidence when no victim impact evidence had been adduced before the jury.

XII. Whether the trial court erroneously refused to instruct the jury that a Defendant who receives a sentence of imprisonment for life shall not be eligible for parole until service of at least twenty-five full calendar years.

XIII. Whether the trial court's permitting a juror to break sequestration prejudiced the Defendant.

XIV. Whether the cumulative effect of errors violates constitutional due process guaranties as to the Defendant's sentence of death.

XV. Whether the Defendant's sentence of death is disproportionate, especially in light of the life sentence received by his co-defendant.

XVI. Whether the trial court was without subject matter jurisdiction following the invalidation of the Defendant's illegal sentence.

After review, this court finds no error of law requiring reversal. Accordingly, we affirm the jury's imposition of the death sentence.

OPINION

Re-sentencing Hearing

Resentencing proceedings began on October 1, 2002, in the Circuit Court for Cocke County. Chief Detective Robert Caldwell of the Cocke County Sheriff's Department testified that at approximately 10:00 a.m. on December 4, 1989, he was called to investigate a shooting death. He found the victim, Lisa Stephenson, sitting in the driver's seat of her car with a large hole in her forehead. She had been shot to death through the windshield. Detective Caldwell's investigation led him later that night to the home of Ralph Thompson in Morristown, Tennessee, where a high-powered rifle was recovered. The rifle smelled as if it had been recently cleaned. Although bullet fragments were later recovered from the victim, it was not possible to establish whether they were fired from that rifle. Detective Caldwell testified that the Defendant, Jonathan Stephenson, lived over fifteen miles from the murder scene and had no criminal record. An autopsy revealed that the victim had been shot in the forehead at close range and her hands indicated that she was in a defensive position when she was killed.

The testimony of Glen Franklin Brewer, given at the Defendant's 1990 trial, was read into evidence. Brewer stated that in 1989 he and the Defendant both worked as truck drivers for JIT Express in Morristown. A few weeks after he became acquainted with the Defendant, the Defendant began talking about wanting to kill someone "practically every time we got together." Brewer did not know who the intended victim was, only that the Defendant wanted Brewer to kill the Defendant's friend's wife. The Defendant offered Brewer various forms of payment in exchange for the killing including cash, insurance proceeds, and a boat and motor. The Defendant told Brewer that the victim lived out in the country and offered various ways she could be shot and killed. Brewer recalled that one night, the Defendant brought a handgun to work and told Brewer he had the money with him. Brewer refused to become involved in any such killing. A few weeks after the last discussion he had with the Defendant about killing the victim, Brewer returned from a road trip and learned through a newspaper article about Lisa Stephenson's murder.

The prior trial testimony of Michael Litz was also read into evidence. Litz testified that he met the Defendant through a friend named Ralph Thompson. In the fall of 1989, during a discussion among Litz, Thompson, and the Defendant, the Defendant offered Litz $5,000 to kill his wife. The Defendant suggested that Litz go to his mobile home and shoot his wife with a rifle as she sat on the couch. The Defendant stated that his wife intended to divorce him and "take everything he'd ever worked for" and said this was the reason he wanted her killed. Litz stated they never discussed killing the Defendant's wife again. Litz recalled next seeing the Defendant on December 3, 1989, the day of the murder. Litz and Thompson went to the Defendant's house to cut firewood and then to Thompson's house to watch movies. The Defendant arrived that evening and reminded Thompson about a job interview. Thompson changed clothes and left with the Defendant. Thompson later returned alone. On cross-examination, Litz testified that Thompson had a key to a fishing boat owned by the Defendant and a key to the Defendant's truck. Litz stated that he and Thompson had permission to take the truck and boat and go fishing whenever they liked. Litz acknowledged that Thompson owned a hunting rifle.

Julie Webb testified that in 1989 she was single and living in La Follette, Tennessee. She met the Defendant that year at Rumors bar in Knoxville and the two began dating. The Defendant told Webb that he had a son and had been married, but that his wife, Lisa, had been killed in a car accident five years earlier. The Defendant also told Webb that after his wife's death, he developed a relationship with his wife's sister, Kathy, and the two had a child together. Webb testified that her relationship with the Defendant was "serious" and they had discussed marriage. On the weekend before Lisa Stephenson's murder, Webb accompanied the Defendant to a K-Mart where he bought rifle ammunition. Webb stated that in the afternoon on the day of the murder, she and the Defendant were supposed to meet. Instead, they spoke on the telephone and agreed to meet at 8:00 o'clock that evening. However, they did not meet and Webb did not hear from the Defendant again until 10:30 that night when he called and instructed Webb to meet him in Harrogate, Tennessee. Webb met the Defendant at a Hardee's restaurant and the Defendant informed her that "Kathy" was dead. The Defendant explained that he and Ralph Thompson had gone to a place where Kathy was meeting with people to whom she owed money. The Defendant said that when he and Thompson arrived, Kathy was already dead. According to the Defendant, he and Thompson fought the two men that

had killed her and left them for dead. The Defendant told Webb that the police "were in with the people" that killed Kathy. Asked about his children, the Defendant told Webb that they were with Kathy's father. Webb testified that the Defendant commented about Kathy, "I didn't love her, but I'm going to miss the Bitch." The next morning, the Defendant called Webb at her office and told her he had been called in for questioning. The following day, Webb learned that the woman the Defendant had been referring to as "Kathy" was actually his wife, Lisa.

Webb read a letter the Defendant wrote to her from jail in December 1989. In the letter, the Defendant stated that he had told his wife about Webb and asked Webb not to "get involved with this." He denied killing Lisa, hinting that Lisa was "involved with some powerful people." The Defendant said that "David and Ralph" are both involved and asked Webb not to say anything about the time he and she had met at Hardee's. The Defendant told Webb that he loved her. Webb agreed that everything the Defendant had told her was a lie.

On re-direct examination, Webb testified that the Defendant gave her a ring in November 1989. She further recalled a time when she traveled with the Defendant to his father's home near St. Louis. Upon their arrival, the Defendant hitched up a boat and told Webb that he did not want to go inside because the Defendant's children were staying with his father and would want to return to Tennessee with the Defendant if they saw him. The Defendant and Webb returned to Tennessee, and the boat was stored at Webb's house. Webb later told authorities about the boat and it was seized. Webb testified that the Defendant also owned another boat, different from the one they picked up in St. Louis.

David Davenport testified that in December 1989, he was a special agent with the Tennessee Bureau of Investigation.[1] On December 4, 1989, he interviewed the Defendant at the sheriff's department about the Defendant's wife's murder. Agent Davenport recalled the Defendant's statement: The Defendant had left home at around 7:00 p.m. on December 3, 1989, and gone to Ralph Thompson's home. The Defendant told Thompson about a job that Thompson might get with the help of the Defendant's friend, Dave Robertson. The Defendant stated that he and Thompson went to Robertson's house and stayed there until 10:00 p.m. and then went to work. The Defendant told Agent Davenport that he and his wife were getting along great and did not have any serious disagreements, although the Defendant also stated that he had a girlfriend. The Defendant believed that his wife also had a boyfriend, but he wasn't sure who it was. However, the Defendant told Agent Davenport that he would not dream of giving up his wife and that divorce had not been discussed. According to the Defendant, after he had left Morristown that evening, he stopped at Harrogate and visited with his girlfriend. The Defendant denied trying to hire anyone to hurt his wife. He told Agent Davenport that he did not know anyone that would have killed her and offered to take a polygraph test.

At 2:15 p.m. the next day, Agent Davenport again met with the Defendant. At that time, the Defendant noted that he and his wife had been to a movie and dinner on the day before her death.

[1] At the time of the instant resentencing, Davenport had become Jefferson County Sheriff.

He essentially repeated that on the day his wife was killed, he had gone to Thompson's house, then to Robertson's home, and then to work, leaving about 10:15 p.m. He denied being involved in any criminal activity. Later that evening, Agent Davenport again questioned the Defendant. At this meeting, Agent Davenport confronted the Defendant with Thompson, who informed the Defendant that he had given a statement about his involvement in the murder to police. In response, the Defendant told Agent Davenport that the year before, his supervisor, Dave Robertson, had asked the Defendant if he knew anyone who could kill Robertson's ex-wife. The Defendant stated that he approached Thompson, who agreed to take the "job" for $15,000. The Defendant stated that on the night of his wife's murder, he and Thompson went to Robertson's house and Thompson brought his rifle. The Defendant stated that he stayed at Robertson's house for two hours. Thompson left and returned, said "it" was done, and gave the Defendant two rifle shells. The Defendant stated he had no idea his own wife had been killed until he was notified later that night. The Defendant further stated that after the murder, he asked Thompson why Thompson had killed his wife. Thompson replied that he didn't know it was her. The Defendant told Agent Davenport that he did not believe that Thompson had killed his wife, but that he had taken someone with him who had.

Agent Davenport confronted the Defendant, telling him that Dave Robertson had told a different story and that he didn't believe the Defendant. The Defendant then admitted that his initial statement was not true. The Defendant admitted that he and Thompson planned to kill Lisa, but the Defendant stated that he did not pull the trigger. According to the Defendant, he picked up Thompson, who was carrying a rifle. The two men went to Robertson's house for a few minutes at about 7:15 p.m. The Defendant told Robertson to tell anyone who asked that they had remained there until 9:45 p.m. Thompson directed the Defendant to drive down a gravel road in the country, then told the Defendant where to stop. Thompson exited the car with the rifle. The Defendant remained in his car and heard a shot. The Defendant drove back down the road and saw his wife's car. He picked up Thompson, who gave him two empty rifle cartridges. The Defendant went to work and threw away the cartridges on the way. The Defendant stated that he told his girlfriend that his wife had gotten into some trouble and he wasn't able to stop it. The Defendant concluded his signed statement as follows: "Ralph asked me if he killed Lisa would I give him my boat, motor and truck and I told him I would. I did not pull the trigger. I did not arrange the set up. Ralph took care of everything."

Bobby Stephenson, the Defendant's father, testified that he owned a boat that he discovered missing one morning, and he had reported it stolen. He stated that he had not given the Defendant permission to take the boat. Near the end of the Defendant's trial, Agent Davenport informed Stephenson that his boat had been found chained to a tree at Julie Webb's house and could be picked up from police storage. Stephenson did not know how the boat got to Webb's house and never knew his son had taken the boat. On further examination, Stephenson stated that the Defendant had permission to use the boat when he wanted.

The victim's father, H.A. Saylor, testified he lived in a mobile home in a wooded area of Hamblen County. His daughter had another mobile home she shared with her family at the back of the same property. On December 3, 1989, he and his wife worked the "graveyard shift," returning

home at 7:00 a.m. Around noon, he became concerned after not noticing any activity at his daughter's house. He explained that his daughter did not work outside the home, but painted figurines for a local company which allowed her to stay home and care for her children. Saylor knocked on her door and found his 4-year old grandson eating from a box of cereal. The child had prepared a bottle for his 8-month old brother. Saylor took the children to his home and began looking for his daughter. When he arrived home, authorities were there and told him that she had been murdered. Saylor testified that he and his wife adopted the children and had raised them since his daughter's death. Saylor identified a ring as one he had brought back from a tour of duty in Korea. He had given it to his grandson when he was born, and his daughter had kept it in a locked jewelry box. Saylor testified he had not given the Defendant permission to give the ring to his girlfriend, but had noticed the ring on Julie Webb's finger during the Defendant's trial. After the sheriff spoke to Webb, she returned the ring to Saylor. Saylor testified that the Defendant had not tried to contact his children and had never expressed remorse or sorrow for his wife's murder. The Defendant's parents had visited with the children through the years. Saylor admitted telling the Defendant's mother that he did not want the children to visit the penitentiary and had not encouraged any contact with the Defendant.

This concluded the state's proof.

Jenny Whitson, an interior decorator and minister, met the Defendant during her monthly visits to the prison. She described the Defendant as "the cream of the crop" among the prisoners because he took interest in other prisoners and ministered to and helped them. Further, the Defendant's prayer requests were for other people, not for himself. Whitson testified that the Defendant was a member of a racially mixed gospel singing group in prison. She felt that the Defendant was an asset to the prison system. She stated she supported the death penalty for "incorrigibles," but not in the Defendant's case.

Dr. Eric Engum, a clinical psychologist, performed a comprehensive psychological and neuropsychological evaluation of the Defendant, "with an eye toward presenting potential mitigating testimony" at sentencing. He described the Defendant as alert and responsive and "quite articulate." He found the Defendant had above-average intelligence, compared to most other prisoners.

Dr. Engum testified that the Defendant's past history showed a likelihood of a previous attention deficit disorder which was unsuccessfully treated and a potential learning disability. Health wise, Dr. Engum described the Defendant as somewhat of a hypochondriac. Within the prison system, the Defendant appeared well-adjusted. He had completed a paralegal studies program, helped fellow inmates, been ordained as a minister, and had completed 700 hours of education in construction. Dr. Engum measured the Defendant's IQ at 118. He reported that the Defendant had taken advantage of teachings offered within the prison and was performing at a college level. Dr. Engum found no evidence of brain damage. He did find that the Defendant had a "significant level of depression," but tended to repress it. The personality skills tests indicated that the Defendant was quiet, gloomy, serious, passive and had low self-esteem. From his assessment, Dr. Engum diagnosed a depressive disorder with low level constant depression. In addition, the Defendant had a

personality disorder with schizoid, depressive and avoidant features. Dr. Engum measured the Defendant at 65 on a 100 point scale, "which reflects mild psychological difficulties, but nothing which would substantially interfere with his ability to perform within . . . a prison setting."

As to mitigating circumstances, Dr. Engum found no significant disciplinary problems with the Defendant in prison and opined that the Defendant "was living as full a life as one could expect within that environment." The Defendant was clearly an asset to the institution. In addition, the Defendant was allowed to work in the prison library and to meet with other prisoners, reflecting the good degree of independence given to him. Dr. Engum described the Defendant as responsible and reliable. Upon further questioning, Dr. Engum reported that he found nothing about the Defendant that would prevent him from knowing the difference between right and wrong and nothing that would prevent him from conforming his actions to the dictates of the law. Dr. Engum stated that his finding that the Defendant was a passive individual was consistent with a theory that if he and another person committed a crime, the Defendant would not have been the leader.

Ralph Thompson testified that he was tried and convicted for the victim's murder and had been incarcerated for the past 10 years. The State had sought the death penalty, but Thompson received a sentence of life imprisonment, plus a concurrent 25-year sentence for conspiracy. Thompson stated that he blamed the Defendant for his situation. Thompson testified that he did not shoot the victim but was in the area when she was killed. As they left the murder scene, Thompson stated that he shot his hunting rifle out the window of the car at the Defendant's request. Thompson acknowledged that he had discussed receiving the Defendant's boat and truck if he killed the Defendant's wife, but stated that an agreement was never reached. Thompson testified that several months before the murder, the Defendant began asking if Thompson knew someone who could kill his wife. The Defendant later told Thompson that he would give Thompson his boat and truck if Thompson would commit the crime. According to Thompson, a week before the murder, the Defendant asked Thompson if he knew an out-of-the-way-place where he could get rid of his wife. Thompson suggested his uncle's place on Bruner's Grove in Cocke County, and gave the Defendant directions to the location. This was the place where Stephenson was later killed. On the day before the murder, the Defendant told Thompson that his wife would be going to the location to pick up some money for drugs. Thompson stated that he asked about the Defendant's children and the Defendant told him that Lisa's father always checked on them when he returned from work. The Defendant came to Thompson's home that evening and asked for Thompson's rifle. The two then went to Dave Robertson's house and the Defendant told Robertson to tell anyone who asked that they had stayed there until 9:45 pm. Thompson stated that he and the Defendant then went to the location in Bruner's Grove and Thompson got out of the truck and looked around. A car approached, the Defendant got out of the truck with the rifle, and Thompson heard a shot. Thompson saw Lisa slumped over in her car and asked the Defendant what he had done, to which the Defendant replied, "It was like shooting a deer." Thompson testified that the Defendant also told him that he, the Defendant, "was ruined either way in this." Thompson returned home and cleaned his rifle. Thompson stated that he had no personal reason to kill Lisa and that it was the Defendant who wanted to be rid of her. Thompson described the victim as a good mother and wife, stated that he liked her and said that he could not have shot her.

Nancy Lemieux, the Defendant's mother, testified that she met her husband and they married in 1961. They had three sons, the Defendant and his brothers, Robby and Timothy. The Defendant's father served in the Air Force and the family moved frequently. Lemieux described the Defendant as a pleasant child who did not cause much trouble as a teenager except for an episode during high school when he had "emotional problems" and attempted suicide. Lemieux stated that the Defendant was a good son, was devoted to his brothers and had a lot of friends. Lemieux and the Defendant's father eventually divorced. The Defendant was upset over the divorce and moved to Tennessee where he spent time with both sets of his grandparents. Lemieux later remarried and lived in Oklahoma. She testified that she and her husband had tried to maintain contact with the Defendant's children since their mother's murder, but could never work out visitation with Lisa's father. Lemieux stated that she regularly visited the Defendant and felt that he had become easier to talk with and was no longer the angry young man who first arrived at the prison. Lemieux testified that the Defendant told her that he had accepted Christ and he seemed "totally different" since then. She had seen him play music as part of a gospel group and described him as a "peacemaker" who worked well with prisoners of all races. Lemieux further testified that the Defendant did not deserve the death sentence because he was a good prisoner and a good Christian who was trying to pay back society for what he took. She stated that the Defendant's family did not deserve to wait for him to be put to death. She felt the Defendant deserved to be in prison, but not to die. She noted Ralph Thompson had not received the death penalty.

Wade Tate testified that he had been a counselor at Northeast Correction Center for thirteen years and had worked with the Defendant for the past three years. He was aware that the Defendant was one of the inmates appointed by the warden to help other inmates pursue their legal remedies. The Defendant also served on a board that heard in-house disciplinary cases and was part of a program in which inmates talked with troubled juveniles. Tate described the Defendant as having above average intelligence and behavior more "positive" than the average inmate. On further examination, Tate noted that the Defendant had several disciplinary reports including ones for having contraband, possession of a deadly weapon, destroying state property and creating a disturbance. He further testified that these reports were from years earlier, before the Defendant arrived at the Northeast facility. The Defendant had not been in trouble other than for having bologna in his cell in the past seven years. Tate agreed that the Defendant was "pretty upbeat" about finding a way out of his legal situation.

Jack Sallie testified that he had been a correctional officer at Northeast for the past eight years. He supervised inmates and met the Defendant at a prison church service. He was aware that the Defendant served as an inmate advisor to other inmates. He described the Defendant as a model prisoner and an asset to the prison. He stated that the Defendant helped others through playing music and singing in the prison ministry. Sallie testified that he and the Defendant had never talked about the Defendant's crime at all.

Ernest Wilby, inmate relations coordinator, testified that he met the Defendant while he was serving as a correctional officer. Wilby supervised the legal library and hired the Defendant as a

legal clerk. He testified the Defendant did an "excellent" job helping other inmates with their legal research.

Jesse Gregg, a correctional officer, testified that he served as the Disciplinary Board Chairperson at the prison and the Defendant was one of his inmate advisors. According to Gregg, the Defendant was a good inmate who never caused any trouble and occasionally worked to calm other inmates at the disciplinary hearings. He testified the Defendant was one of four inmate advisors for the entire prison.

Judy Hyder, church member, testified that she knew the Defendant through the prison ministry. He had faithfully attended all the services for the past eleven years. He showed maturity dealing with other inmates and sang with the group of black inmates although it was unusual for white and black inmates to mix. Hyder stated that the Defendant seemed stable, honest and sincere. Hyder further testified that she was unaware of the Defendant's crime until someone told her in preparation for the sentencing hearing.

The Defendant's father, Bobby Stephenson, further testified that his son was a normal kid who did not get into trouble growing up. He was involved in church and sports programs. Stephenson visited the Defendant at least twice a year and stated that the Defendant was more receptive to others since going to prison. Other inmates and their families had told Stephenson that the Defendant was helpful to the other inmates in accepting Christ. Stephenson testified that he did not believe God was finished with the Defendant and that the Defendant could continue to help others through the ministry. As to visitation with his grandchildren, Stephenson stated that the victim's father would not permit it and that presents sent to the children were returned, unopened. Stephenson stated that the Defendant had tried unsuccessfully to contact his children through him. Stephenson stated that he was about to lose his son again, and that he had already lost his daughter-in-law and grandchildren, whom he loved and missed.

Tim Stephenson, the Defendant's brother, testified that the Defendant practically raised him while their parents both worked. The Defendant cared for him, helped him with school, and took him everywhere. Stephenson stated that since going to prison, it seemed that the Defendant had hope and was a sincere person. When visiting his brother, other prisoners and their families wanted to shake his hand because they loved the Defendant. Stephenson's own six-year old son also loved the Defendant and had visited him in prison. Stephenson testified that he would continue to profess that he would never choose anyone other than the Defendant to be his older brother.

Following deliberations, the jury found that the state had proven the aggravating circumstance of murder for remuneration or the promise of remuneration. The jury further found that the aggravating circumstance outweighed any mitigating circumstances. Upon their verdict, the jury sentenced the Defendant to death.

Analysis

I. Double Jeopardy

The Defendant contends that his "dual sentences of incarceration and death constitute multiple punishments for the same conduct" in violation of the constitutional prohibitions against double jeopardy. He acknowledges that in his first appeal to the Tennessee Supreme Court, his double jeopardy argument was rejected. Therein, the Court stated:

> The defendant initially asserts that his rights under the double jeopardy clause of the Fifth Amendment to the United States Constitution were violated because he was convicted of both first-degree murder and conspiracy to commit first-degree murder. The double jeopardy prohibition embodied in the Fifth Amendment is applicable to the states through the Fourteenth Amendment and protects criminal Defendants from being "subject for the same offense to be twice put in jeopardy of life or limb."
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> In State v. Black, 524 S.W.2d 913 (Tenn. 1975), this Court adopted the well-known "Blockburger test" for determining when to sustain multiple convictions which are based upon the same acts or transaction. The broad question is whether or not the offenses at issue constitute the "same offense" under the double jeopardy clause. As Black makes clear, multiple convictions do not violate double jeopardy if "[t]he statutory elements of the two offenses are different, and neither offense is included in the other." Id. at 920, citing Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). Specifically, the Blockburger test requires that "courts examine the offenses to ascertain "whether each [statutory] provision requires proof of a fact which the other does not." Id., 420 U.S. at 786, 95 S.Ct. at 1294, quoting Blockburger v. United States, 284 U.S. at 304, 52 S.Ct. at 182.
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> This Court has previously stated that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. See State v. Smith, 197 Tenn. 350, 273 S.W.2d 143, 146 (1954); Solomon v. State, 168 Tenn. 180, 187-88, 76 S.W.2d 331, 334 (1934). In determining whether there has been a double jeopardy violation in this case, we must compare the statutory elements of criminal conspiracy and the statutory elements of first-degree murder, in accordance with the Blockburger test.
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> Stephenson was convicted of premeditated first-degree murder, which is defined by statute as "an intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (Tenn. 1991). A criminal conspiracy is committed "if two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of

> them will engage in conduct which constitutes such offense." Tenn. Code Ann. § 39-12-103(a) (1991). A comparison of the two statutes clearly demonstrates that the two offenses are not identical and do not rest on the same facts. First-degree "[m]urder requires proof of a killing, but not necessarily of an agreement with another person or persons to commit that killing. Conspiracy on the other hand, requires proof of an agreement but proof of the killing is not necessary." Chinn v. State, 511 N.E.2d 1000, 1003 (Ind. 1987). We, therefore, conclude it was constitutionally permissible for Stephenson to be convicted of both first degree murder and conspiracy to commit first-degree murder. Cf. State v. Brittman, 639 S.W.2d 652, 653-54 (Tenn. 1982).

State v. Stephenson, 878 S.W. 2d 530, 538 (Tenn. 1994) (footnotes omitted).

"Under the doctrine of the law of the case, when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case, which must be followed upon remand by the trial court and by an appellate court on a second appeal." State v. Carter, 114 S.W. 3d 895, 902 (Tenn. 2003), cert. denied, __ U.S. __, 1124 S.Ct. 1511 (2004).

> However, an issue decided in a prior appeal may be reconsidered if: (1) the evidence offered at the hearing on remand was substantially different from the evidence at the first proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in the controlling law occurring between the first and second appeal.

Id. In the present case, the Defendant claims that changes in the law since his first appeal allow this court to revisit his double jeopardy claim.

The Defendant relies on decisions of the United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002) and Sattazhan v. Pennsylvania, 537 U.S. 101 (2003), in support of his Fifth Amendment double jeopardy claim. He essentially asserts that in this case, conspiracy to commit first degree murder is a lesser included offense of the particular "murder plus an aggravator" crime for which he was also convicted. The Defendant concludes that the death sentence imposed subsequent to the sentence of incarceration for his conspiracy conviction is barred as successive punishment for the same offense.

We begin with the well-known case of Apprendi v. New Jersey, 530 U.S. 466 (2000). In overturning the sentence enhancement provisions of a hate-crime statute under Arizona law, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Subsequently, in Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court extended its holding in Apprendi to capital cases and held that the aggravating circumstances necessary to support the imposition of the death penalty must be found by a jury beyond a reasonable doubt rather than by a trial judge. Id. at 609. In the present case, the

Defendant asserts that under Ring, Tennessee Code Annotated section 39-13-204 aggravating circumstance must be considered an element of the conviction offense of capital murder. He asserts that this "murder plus an aggravator" analysis was explicitly extended in the double jeopardy context in Sattazhan, 537 U.S. at 111, and in his case establishes a constitutional violation.

This Court cannot agree with the Defendant's analysis. In Ring, the U.S. Supreme Court noted that the petitioner presented a "tightly delineated" Sixth Amendment claim. Ring, 536 U.S. at 597 n. 4. In its narrow holding, the Court stated that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 494, n.19, the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609.

In Sattazhan, the Defendant was convicted of first degree murder. At sentencing, the jury deadlocked and the trial court therefore imposed a life sentence under state law. On appeal, the Defendant's conviction was overturned. On retrial, the Defendant was again convicted and the jury sentenced him to death. The Supreme Court held that the Fifth Amendment's Double Jeopardy Clause did not bar the state from seeking the death penalty on retrial after a hung jury at the first capital sentencing proceeding. See Sattazhan, 537 U.S. at 106.

Noting its decisions in Apprendi and Ring, the Court in Sattazhan stated that it could "think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offense' for purposes of the Fifth Amendment's Double Jeopardy Clause." Sattazhan, 537 U.S. at 111. Initially, we think it important to note, as did the State, that the portion of the opinion in which this language appears was not joined by a majority of the Court. Moreover, as to the majority opinion, we do not read it to hold directly or by implication that the analysis of double jeopardy claims has been changed so that aggravating circumstances must be included as actual elements of the offense for purposes of conducting a comparison of the statutory elements of the offenses under Blockburger. Therefore, applying the principles of Ring together with the Court's subsequent decision in Sattazhan v. Pennsylvania offers the Defendant no relief.

The Defendant next presents a double jeopardy challenge under Article 1, Section 10 of the Tennessee Constitution. He correctly notes that the applicable test for resolving this claim has changed since the time of his 1994 conviction and sentence for conspiracy.[2] In State v. Denton, 938 S.W. 2d 373, 381 (1996), our supreme court held that

> resolution of a double jeopardy punishment issue under the Tennessee Constitution requires the following: (1) a Blockburger analysis of the statutory offenses; (2) an analysis, guided by the principles of Duhac, of the evidence used to prove the

[2] In Stephenson v. Carlton, 28 S.W. 3d 910, 912, n.3 (Tenn. 2000), the Tennessee Supreme Court expressly stated that its decision invalidating his death sentence did "not affect Stephenson's separate conviction and 60-year sentence for the offense of conspiracy to commit first-degree murder."

offenses; (3) a consideration of whether there were multiple victims or discrete acts; and (4) a comparison of the purposes of the respective statutes.

Further, "[n]one of these steps is determinative; rather the results of each must be weighed and considered in relation to each other." Id.

Applying the four-part test adopted in Denton, we initially conclude that the conviction offenses are not the same when the statutory elements are compared under Blockburger. As our Supreme Court explained in the Defendant's first appeal, "[a] comparison of the two statutes clearly demonstrates that the two offenses are not identical and do not rest on the same facts." Stephenson, 878 S.W. 2d at 538. Next, under Duhac, our supreme court explained that "the test is whether the same evidence is necessary to prove both offenses." Duhac v. State, 505 S.W. 2d 237, 241 (Tenn. 1974). In this case, the State relied on evidence that the Defendant agreed to give Ralph Thompson a boat, motor and truck in exchange for Thompson killing his wife. This evidence established the conspiracy but was not necessary to proving first degree murder. As to the murder, the State relied on proof that the Defendant and Thompson carried out their plan and the Defendant's wife was in fact killed. Under the remaining Denton factors, we further consider that there are not multiple victims in this case. However, the commission of the offenses involved discrete acts, the most notable of which is the murder itself. Finally, the legislative intent of the statutes is different. Tennessee Code Annotated section 39-13-202(a)(1) was intended to deter premeditated, intentional killings. As reflected in the comments of the sentencing commission, the conspiracy statute, on the other hand, is "aimed at group criminality,"and its purpose is to deter agreements to commit any number of criminal offenses. Tenn. Code Ann. § 39-12-103. Most significantly, the legislature has expressly codified its intent that "[a] person may be convicted of conspiracy and the offense which was the object of the conspiracy." Tenn. Code Ann. § 39-12-106(c).

Because the offenses in the present case have different statutory elements, the convictions were based on different proof, and the legislative purposes are different, this court concludes that no double jeopardy violation exists by virtue of the Defendant's convictions and punishment for both first degree murder and conspiracy to commit first degree murder.

II. Aggravating Circumstances under Apprendi v. New Jersey

Conceding that he raises this issue largely to preserve it for further appellate review, the Defendant asserts that the grand jury's failure to charge in the indictment the aggravating circumstance relied upon to support his death sentence renders the sentence invalid under Apprendi and its progeny. The Defendant acknowledges decisions of our Supreme Court to the contrary, but submits that they are wrongly decided.

Following Apprendi, our Supreme Court decided State v. Dellinger, 79 S.W. 3d 458 (Tenn. 2002). Therein, the Court rejected the Defendant's suggestion that under Apprendi, aggravating circumstances in a prosecution for capital murder must be charged in the indictment. The Court

expressly held that Apprendi's requirements did not apply to Tennessee's capital sentencing procedures because:

> 1. The Apprendi holding specifically excluded from its requirements the prior conviction aggravating circumstance, and this was the only circumstance at issue in Dellinger's case;
>
> 2. The Apprendi holding applied only to enhancement factors used to impose a sentence above the statutory maximum, and under the Tennessee statutory scheme, the death penalty was within the statutory range of punishment;
>
> 3. The Apprendi court was concerned about a Defendant receiving a sentence beyond what was expected based on the charged offense and the range of punishment, while Tennessee Rule of Criminal Procedure 12.3, which requires notice to a Defendant when the death penalty is sought, satisfied the requirements of notice and due process;
>
> 4. The Apprendi holding applied to judge sentencing and under the Tennessee capital sentencing scheme, juries, not judges, made the factual findings regarding the existence of aggravating circumstances; and
>
> 5. The Apprendi holding required application of "beyond a reasonable doubt" standard for finding enhancement factors, and under the Tennessee capital sentencing scheme, the jury was already required to make its findings of aggravating circumstances "beyond a reasonable doubt."

State v. Berry, 141 S.W. 3d 549, 559 (Tenn. 2004) (citing State v. Dellinger, 79 S.W. 3d at 466-67) (footnotes omitted). In a footnote, the Court observed that it may have been more accurate to state that Apprendi did not "affect" Tennessee's capital sentencing scheme for the reason that "our procedure already provided that aggravating circumstances must be submitted to and found by a jury beyond a reasonable doubt." Berry, 141 S.W. 3d at 559 n. 12; (citing Tenn. Code Ann. § 39-13-204 (1997)). Following Ring, our Supreme Court has continued to reject the argument that aggravating circumstances must be set forth in the indictment. See State v. Berry, 141 S.W. 3d at 562; State v. Holton, 126 S.W. 3d 845, 863 (Tenn. 2004).

The Defendant nonetheless urges this court to hold that "because the indictment alleges only premeditated and deliberate first degree murder and does not allege 'murder plus at least one aggravating circumstance,'". . . no valid judgment can be pronounced on the indictment. He relies on Sattazhan, wherein the Court restated the application of Apprendi and Ring in capital cases as follows:

> That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a Defendant to

> a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt.

Sattazhan, 537 U.S. at 111 (citations omitted).

"'[I]t is a controlling principle that inferior courts must abide the orders, decrees and precedents of higher courts.'" State v. Irick, 906 S.W. 2d 440, 443 (Tenn. 1995) (quoting Barger v. Brock, 535 S.W.2d 337, 341 (Tenn. 1976)). As noted, our supreme court has repeatedly rejected the argument that aggravating circumstances must be charged in the indictment under the capital sentencing scheme in this state. In so holding, the Court explained that the focus in Apprendi and its progeny was on the Sixth Amendment right to trial by jury, which right is satisfied by the requirement that the jury in capital cases in this state must find aggravating circumstances beyond a reasonable doubt. Our supreme court has further noted that the United States Supreme Court has expressly declined to impose the Fifth Amendment right to presentment or grand jury indictment upon the States through the Fourteenth Amendment. See Berry, 141 S.W. 3d at 560. In Berry, the Court held that it was "unwilling to do what the U.S. Supreme Court would not." Id.

As an intermediate appellate court, it is beyond our statutory function to overrule the holdings of our supreme court. Reimann v. Huddleston, 883 S.W.2d 135, 137 (Tenn. App. 1993), app. denied (Tenn. 1994). This Court thus declines the Defendant's suggestion that we hold that the failure to allege in the indictment the aggravating circumstance relied on to sentence him to death invalidates his sentencing judgment. This issue is without merit.

III. Motion to Suppress

The Defendant first moved the trial court to suppress his statement before his 1990 trial. Following a hearing, the trial court denied the motion. On appeal, the Defendant argued that the confession should have been suppressed because: (1) his intoxication and emotional condition prevented a knowing, intelligent and voluntary waiver of his right to remain silent; (2) the officers influenced his decision by coercion; (3) his rights were violated by the failure of law enforcement officers to inform him that an attorney, employed by his father, was present at the sheriff's department and asking to see him; and (4) he invoked his right to counsel. See Stephenson, 878 S.W. 2d at 542. The Tennessee Supreme Court affirmed the trial court's ruling that the Defendant "was not intoxicated, had not exercised his right to counsel, and had also made the waivers and given the statements voluntarily and knowingly." Id. at 543-44.

Prior to the instant resentencing hearing, the Defendant filed a second motion to suppress his 1989 statement. On this occasion, the Defendant asserted that his statement was inadmissible because it was given while he was being detained at the sheriff's department without probable cause, contrary to the guaranties of Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment to

the United States Constitution. The trial court ruled that the Defendant was not entitled to a second suppression hearing, finding that the "issue has clearly been litigated, decided against the Defendant, and if there was anything that might not have been said at the time, . . . it would have obviously been waived."

The Defendant correctly argues that the "law of the case" doctrine does not apply to his Fourth Amendment claim. "The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication." State v. Jefferson, 31 S.W. 3d 558, 560 (Tenn. 2000) (quoting Memphis Publ'g Co. v. Tennessee Petroleum Underground Storage Tank Bd., 975 S.W.2d 303, 306 (Tenn. 1998)). The Defendant concedes that his Fifth and Sixth Amendment challenges to the admissibility of his statement have been previously raised and determined on direct appeal. He offers no reason, however, for his failure to include his Fourth Amendment challenge in his original motion to suppress. "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof . . . ." See Tenn. R. Crim. P.12(f). The circumstances surrounding the taking of his statement in 1989 have been known to the Defendant and therefore his argument that there was no probable cause to detain him when he gave his statement could and should have been raised along with his other constitutional challenges to the statement's admissibility. Because the Defendant failed to raise this claim prior to trial, it has been waived, and the trial court did not err in refusing the Defendant another opportunity to assert this challenge.

IV. Trial Testimony of Absent Former Witnesses

At the Defendant's 1990 trial, Glen Franklin Brewer and Michael Litz testified for the state. The gist of both witnesses' testimony was that the Defendant had approached them and offered various forms of payment in exchange for a killing. Brewer testified that he did not know the identity of the intended victim, but the killing was discussed many times, while Litz testified that the Defendant specifically asked him to kill the Defendant's wife. At the re-sentencing hearing, the previous testimony of Brewer and Litz was read into evidence over the Defendant's objections. The prosecutor noted that Mr. Brewer was living in Oklahoma and was found to be in poor health. The prosecutor stated that although he had subpoenaed Brewer, he did not believe his presence was required at a capital sentencing hearing. As to Michael Litz, the prosecutor stated that he had attempted to locate him but without success. Relying on the recent decision in Crawford v. Washington, __ U.S. __, 124 S.Ct. 1354 (2004), the Defendant claims that the admission of the testimony of these witnesses violated his constitutional right to confront the witnesses against him.

The Sixth Amendment to the United States Constitution provides that "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In Crawford v. Washington, the United States Supreme Court held that the Confrontation Clause prohibits the admission of "testimonial" statements by an unavailable witness unless the Defendant has had a prior opportunity to cross-examine the witness. Crawford, 124 S.Ct. at 1374. The Court held that with respect to testimonial evidence, "the Sixth Amendment demands what the common

law required: unavailability and a prior opportunity for cross-examination." Id. In the present case, the Defendant concedes that the cross-examination prong of Crawford was satisfied when he questioned both witnesses at trial. He contends, however, that the unavailability prong has not been met and the admission of the witnesses' trial testimony therefore constitutes reversible error unless the error can be shown to be harmless beyond a reasonable doubt. The state responds that the Confrontation Clause has not been held applicable to a capital sentencing proceeding. In fact, citing pre-Crawford decisions, the state notes that it has been expressly held inapplicable. See Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002) (citing Williams v. New York, 337 U.S. 241, 245 (1949)). But see United States v. Hall, 152 F. 3d 381, 405 (5th Cir. 1998) (assuming "without deciding that the confrontation clause applies to the sentencing phase of a capital trial with the same force with which it applies during the guilt phase.") (citing Proffitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982) ("The Supreme Court's emphasis in [its recent] capital sentencing cases on the reliability of the factfinding underlying the decision whether to impose the death penalty convinces us that the right to cross-examine adverse witnesses applies to capital sentencing hearings")).

We note that this Court has held that "the 'confrontation' guaranteed by the United States Constitution is confrontation at trial." Haggard v. State, 475 S.W.2d 186, 187 (Tenn. Crim. App. 1971). In Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987), a plurality of the United States Supreme Court observed that "the right to confrontation is a trial right." See also United States v. Sasson, 62 F.3d 874, 881 n. 5 (7th Cir. 1995); United States v. De Los Santos, 819 F.2d 94, 97 (5th Cir. 1987); United States v. Boyce, 797 F.2d 691, 693 (8th Cir. 1986).

Upon due consideration, we agree with the State. Crawford newly interpreted the Confrontation Clause and the approach for determining the admissibility of hearsay evidence at a criminal trial. In our view, the language of Crawford does not direct the result that the Confrontation Clause has been expanded to apply to sentencing proceedings, including the penalty phase of a capital trial.

V. Admission of Rifle

The Defendant argues that because neither the cause nor the manner of the victim's death was disputed at sentencing, the admission of the rifle owned by Ralph Thompson served only to inflame the jury and prejudice it against the Defendant. He contends that the trial court erred in failing to balance the probative value against the prejudicial effect of introducing the rifle into evidence.

Tennessee Code Annotated section 39-13-204(c) provides for the admission of evidence in a capital sentencing proceeding as follows:

> [E]vidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating

> circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence . . . .

The issue of a Defendant's guilt or innocence is not relevant at a resentencing proceeding. See State v. Hartman, 703 S.W. 2d 106 (Tenn. 1985). "At a resentencing hearing, both the State and Defendant are entitled to offer evidence relating to the circumstances of the crime so that the sentencing jury will have essential background information 'to ensure that the jury acts from a base of knowledge in sentencing the Defendant.'" State v. Adkins, 725 S.W. 2d 660, 663 (Tenn. 1987) (quoting State v. Teague, 680 S.W.2d 785, 788 (Tenn.1984)).

In the instant case, the sentencing jury was not the same jury which convicted the Defendant and was familiar with the nature and circumstances of the Defendant's crime only through the proof presented at the resentencing hearing. The rifle supported the testimony given by Dr. Blake as to the cause of death and the nature of the murder. As to the circumstances surrounding the murder, Agent Caldwell testified that the rifle was recovered from the home of Ralph Thompson and smelled as though it had been recently cleaned. The rifle thus served to connect the Defendant, who admitted in his statement to having hired Ralph Thompson to kill his wife, with Thompson. For his part, although Thompson denied killing the victim, he admitted owning the rifle and shooting it on the night of the murder. The rifle was admissible to show the nature and circumstances of the crime. This issue is without merit.

VI. Polygraph Test

During his testimony at sentencing, Agent Davenport read from the report he made some thirteen years earlier during his investigation of the Defendant's case. In testifying from the report, Agent Davenport noted that the Defendant had twice offered to take a polygraph test. The first reference occurred as Agent Davenport read the conclusion of his initial interview with the Defendant:

> Stephenson stated that he had no objection to us looking at his truck or taking anything out of it. Stated he hadn't shot his shotgun in the past month or so.
>
> He stated that he did not know anyone that would have killed his wife. Stephenson also agreed to take a polygraph test.

The defense did not object to this testimony. Continuing to read from his investigation report, Agent Davenport testified that at the conclusion of his second interview, "Stephenson stated that he was still willing to take a polygraph test." In response, the defense immediately moved for a mistrial. The court denied the motion and contemporaneously instructed the jury as follows:

> Ladies and Gentleman of the jury, I think it's been mentioned, a polygraph test, in the reading of these reports.
>
> Results of polygraph tests are absolutely inadmissible. The mere fact that the word has been mentioned on two occasions, I will instruct you not to draw any inference at all from that. None whatsoever, just disregard that statement and for the primary reason polygraph test results are totally inadmissible.

The Defendant asserts that Agent Davenport was reading from a previously prepared document with the intended purpose of putting polygraph evidence before the jury. He urges this Court not to countenance such "improper tactics" by the prosecution.

"[P]olygraph examination results, testimony on such results, or testimony regarding a Defendant's willingness or refusal to submit to a polygraph examination is not admissible during capital or non-capital sentencing hearings." State v. Pierce, 138 S.W. 3d 820, 826 (Tenn. 2004). In this case, the transcript reflects that the references made by the State's witness to the Defendant's offers to take a polygraph test were not elicited by the prosecutor's particular line of questioning. Agent Davenport was asked, based on his investigation report, what the Defendant told him "in regards to that murder that evening" and what the Defendant said at his second interview. Regarding the admissibility of incompetent evidence, "the correct practice is to reject such evidence at once, and not permit it to go to the jury." Stokes v. State, 64 Tenn. 619, 621 (1875). Any potential error, however, resulting from unsolicited testimony that offers otherwise inadmissible testimony may be cured by a proper instruction to the jury to disregard the comment. See State v. West, 767 S.W.2d 387, 397 (Tenn. 1989); State v. Foster, 755 S.W.2d 846, 849 (Tenn. Crim. App. 1988). In response to the motion for mistrial, the trial court promptly instructed the jury to give no consideration, "none whatsoever," to the references to polygraph testing. This court concludes that the trial court took proper corrective action and did not err in refusing to grant a mistrial. This issue is without merit.

VII. Testimony about Victim's Ring

The Defendant submits that the trial court erred in allowing the admission of testimony about a ring that the Defendant had given to his girlfriend, Julie Webb. The Defendant argues that the testimony concerning the ring, "obviously intended to suggest that the Defendant had stolen the ring from his young son," was not relevant to either an aggravating circumstance or any mitigating factors at sentencing.

At the conclusion of Webb's testimony, the State sought to introduce the ring into evidence. The trial court sustained the Defendant's objection, but noted the possibility that the ring could be used in rebuttal. Thereafter, through cross-examination, the defense elicited testimony from Detective Caldwell that he was not aware of any "criminal record" that the Defendant had as a result of his investigation. The defense elicited further, similar testimony from Agent Davenport:

Q: [Mr. Ogle]: I know you indicated, Sheriff, that Mr. Stephenson told you he didn't have any criminal arrests, or anything like that. I take it you didn't take his word for that, you checked it, did you not?
A: [Davenport]: I believe I did.
Q: And you found no criminal background on Mr. Stephenson whatsoever?
A: I don't remember any, Mr. Ogle. I don't remember any.
Q: Certainly none reflected in your file, is there?
A: I can't find a criminal record. I don't remember a criminal record on Mr. Stephenson.
Q: And as general procedure, that's something you would check during an investigation?
A: That's correct.
Q: And if there were a criminal history that could be significant as far as the case is concerned, is that true?

Gen. Schmutzer: Your Honor, we'll stipulate we don't have a criminal history.

Based on the testimony of both Detective Caldwell and Agent Davenport regarding the lack of the Defendant's criminal history, the State again sought to introduce the ring. The trial court noted that the State's stipulation had not come until several questions regarding the lack of a criminal background had been asked and answered and ruled that the defense had "opened the door" through its questioning of these State's witnesses. Julie Webb was recalled and testified that the Defendant gave the ring to her in November 1989, and the ring was introduced for identification purposes.

Evidence relevant to the issue of punishment and therefore admissible at a capital sentencing hearing includes "any evidence tending to establish or rebut any mitigating factors." Tenn. Code Ann. § 39-13-204(c). "'Rebutting evidence' is that which tends to explain or controvert evidence produced by an adverse party." Cozzolino v. State, 584 S.W. 2d at 765, 768 (Tenn. 1979) (citing State v. Anderson, 159 N.W.2d 809 (Iowa 1968); Hutchinson v. Shaheen, 390 N.Y.S.2d 317 (1976)). In this case, the Defendant gave notice that he intended to rely on the fact that he had "no significant prior record." See Tenn. Code Ann. § 39-13-204(j)(1). At the hearing, the Defendant then pursued a particular line of questioning with two State's witnesses which was designed to and did in fact support this mitigating factor. The State was entitled to offer proof in rebuttal. The testimony of the victim's father and the Defendant's girlfriend established that the Defendant had taken a ring belonging to his young son and given it to his girlfriend. The fact that the Defendant had not been convicted or even arrested for this offense is irrelevant. As the State correctly notes, when the Defendant relies on the Tennessee Code Annotated section 39-13-204(j)(1) statutory mitigating factor, "he inevitably becomes subject to rebuttal evidence offered by the prosecution showing prior criminal activity. Neither the prosecution nor the defense is limited under this statutory provision to proof of prior convictions." State v. Matson, 666 S.W. 2d 41, 44 (Tenn. 1984). This issue is without merit.

VIII. Testimony Suggesting Lack of Remorse

The State elicited testimony that the Defendant had shown no remorse for the murder of his wife. The victim's father, for example, was asked whether the Defendant had "ever expressed to you and your wife any remorse or sorrow of having murdered her?" Mr. Saylor responded, "None whatsoever." Similar, though less direct, testimony was given by witnesses Wade Tate, Jack Sallie, and Judy Hyder. During a bench conference after the last of these witnesses had been asked whether the Defendant had ever "sought any counseling over remorse for his wife's death," defense counsel argued that "if he's asking about pastoral counseling, those discussions are privileged." The court responded that it assumed the defense had waived the privilege by calling the witness. Defense counsel further stated:

> While we're up here, in order to preserve the record, I understand Your Honor's ruling on the questions about remorse, but to preserve the record I believe we need to make a motion to strike all those references.
>
> The presence of remorse can be a mitigating factor, but we've not advanced that. The absence of remorse is not an aggravating factor. And this Cozzolino case says you can't rebut a proposition that's not been advanced. So, it's not relevant [to] punishment.

During closing argument, the prosecutor twice referred to the Defendant's apparent lack of remorse for his crime. First, he stated:

> But I submit to you there's one thing that cuts against this man having changed and become a Christian, and that is simply nowhere in this record, nowhere from that witness stand have you heard one person say that this Defendant has shown any remorse or any sorrow over the death of his wife, over what he has done. None.

The prosecutor further argued:

> Has he at any time ever shown any remorse? No. Well, I take that back. Probably the closest thing to it was that very night when [he] told Julie Webb, "I didn't love her but I'm going to miss the bitch." That was about the closest thing he's ever come to showing any sorrow or remorse for taking her life.

Before this Court, the Defendant asserts that by allowing such testimony and argument, the trial court erroneously permitted the State to interject a non-statutory aggravating circumstance into the proceeding. The State counters that the Defendant has waived this issue. In the alternative, the State contends that evidence regarding lack of remorse was proper rebuttal evidence to the Defendant's evidence of his reformed character and religious conversion while in prison.

Examining the closing argument first, this Court observes that the Defendant made no objection to the prosecutor's remarks. "It is well settled that without a contemporaneous objection to a prosecutor's statements, the error is waived." State v. Farmer, 927 S.W. 2d 582, 591 (Tenn. Crim. App. 1996) (citing State v. Sutton, 562 S.W.2d 820, 825 (Tenn. 1978); State v. Compton, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982)).

With respect to the testimony concerning the Defendant's lack of a showing of remorse, the Defendant also failed to contemporaneously object to the prosecutor's questions. In fact, the Defendant only moved to strike references to remorse after the fourth witness had essentially completed her testimony. Nonetheless considering the issue, it lacks merit. As discussed in the previous section, the sentencing statute generally permits all evidence deemed relevant to the issue of punishment to be admitted in a capital sentencing proceeding. The prosecution is expressly permitted to rebut any mitigating factors relied on by a Defendant. See State v. Bane, 57 S.W. 3d 411, 424 (Tenn. 2001) (citing Tenn. Code Ann. § 39-2-203(c) (1982); Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001)).

IX. Closing Argument - "Appeal to Vengeance"

In closing argument, the prosecutor stated:

> You've heard the pleading by the family to not give him the death sentence, which you would expect.
>
> It was a plea that the Saylors didn't get the opportunity to make for Lisa.

In response to the Defendant's objection, the prosecutor noted that the point of his argument was that the jury was not to allow sympathy or prejudice to guide its decision. The court allowed the argument to proceed. The prosecutor continued, stating that "His Honor will tell you at the end of his charge that you're not to let sympathy or prejudice guide your decision. That you use reason and common sense."

Citing State v. Bigbee, 885 S.W. 2d 797, 812 (Tenn. 1994), the Defendant argues that this type of argument has been characterized by our supreme court as a "thinly veiled appeal to vengeance" which is not permissible in a capital proceeding and which error in part led to a reversal in that case. In Bigbee, the Court held that among other errors, a portion of the prosecutor's argument was improper as follows:

> Finally, the prosecutor strayed beyond the bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings in Sumner and Montgomery Counties, and encouraging the jury to give the Defendant the same consideration that he had given his victims. Although the prosecutor could have properly counseled the jury to avoid emotional responses that were not rooted in the trial evidence, the argument here encouraged the jury to make a retaliatory sentencing

> decision, rather than a decision based on a reasoned moral response to the evidence. As such, the argument was improper.

Bigbee, 885 S.W. 2d at 812 (citations omitted). The Court also noted that the prosecutor's remarks encouraged the jury to further punish the Defendant for killings in Montgomery County for which he had previously been convicted and sentenced to life imprisonment. The Court concluded that while these errors "might have been harmless standing alone, we find that, considered cumulatively, the improper prosecutorial argument and the admission of irrelevant evidence affected the jury's sentencing determination to the Defendant's prejudice." Id.

On close examination, this Court concludes that the challenged portion of the prosecutor's argument did not rise to the level of the argument found improper in Bigbee. The prosecutor's remarks essentially urged the jury not to be swayed by sympathy or emotion in response to the pleas of the Defendant's family for a sentence other than death. We find nothing improper in the prosecutor's argument.

X. Closing Argument - Consideration of Proof

Regarding evidence of whether the Defendant himself or Ralph Thompson actually fired the fatal shot, the prosecutor told the jury to "listen closely to the charge from the judge" and "[i]f he tells you that it is important as to who pulled the trigger, then you consider it." The Defendant contends that the prosecutor's argument was "egregiously improper" in that it suggested to the jury that they should disregard any proof which the trial court did not expressly tell them it was important for them to consider including factual evidence that the Defendant himself may have committed the murder. The ultimate gist of the Defendant's argument is that the State could not prove the murder was committed for remuneration or promise of remuneration if the Defendant himself shot and killed his wife.

The record reflects that the challenged remarks were made as the prosecutor began to discuss its burden of proving an aggravating circumstance. The prosecutor stated:

> The State, as you all well know, has to prove an aggravating circumstance, beyond a reasonable doubt.
>
> And I submit to you the State has to go no further than the words that came from this Defendant's mouth on December 5th, when he finally came across to telling the truth about what happened to the officers, and you heard it because the aggravating circumstance is, that you employ another to commit a crime for remuneration or the promise of remuneration, there's absolutely no question.
>
> Ralph asked me if he killed Lisa would I give him my boat, motor and truck and I told him I would. The same thing he'd offered Glen Brewer. I don't need to go any further than that, folks.

> Now, apparently defense believes that maybe if they can show that their client pulled the trigger, that that doesn't apply. I submit to you, listen closely to the charge from the judge.
>
> If he tells you that it is important as to who pulled the trigger, then you consider it. If he doesn't, I submit to you . . .

Following the Defendant's objection being overruled, the prosecutor continued:

> Listen closely to the Court's charge. If he tells you to consider it I submit to you, I know you will, there'll be no question about it. If he doesn't, I submit to you, you don't.
>
> That's not the end of it. The fact that the State has proved the aggravating circumstance, you're to go further and look at the mitigating circumstances.

Closing argument is a valuable privilege that should not be unduly restricted. See State v. Bane, 57 S.W. 3d 411, 425 (Tenn. 2001) (citing Bigbee, 885 S.W.2d at 809). The trial court has wide discretion in controlling the course of arguments and will not be reversed absent an abuse of that discretion. Id. In the present case, the trial court overruled the objection to the prosecutor's argument, noting that the court had just instructed the jury that it would not be bound by any principles of law mentioned in counsel's argument, but was bound to apply the law only as instructed by the court. "The general principle in criminal cases is that there is a duty upon the Trial Judge to give the jury a complete charge on the law applicable to the facts of the case. The Defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the Judge." Poe v. State, 370 S.W. 2d 488, 489 (Tenn. 1963) (citing Crawford v. State, 44 Tenn. 190, 194-195 (Tenn. 1867); Green v. State, 285 S.W. 554 (Tenn. 1926); Myers v. State, 206 S.W.2d 30 (Tenn. 1947); Harbison v. Briggs Paint Co., 354 S.W.2d 464 (Tenn. 1962). In our view, the prosecutor's remarks served only to emphasize the trial court's charge to the jury and otherwise fell within the wide range of permissible argument. This issue is without merit.

XI. Victim Impact Evidence

The Defendant contends that no victim impact evidence was introduced by the State and the court's instruction served only to invite the jury to render a verdict based on sympathy for the victim's family. In its charge, the trial court instructed the jury regarding victim impact evidence as follows:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. You may consider this evidence in determining an appropriate punishment.

> However, your consideration must be limited to a rational inquiry into the culpability of the Defendant, not an emotional response to the evidence.
>
> Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt the aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of the alleged aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance found outweighs the finding of one or more mitigating circumstances beyond a reasonable doubt.

As both parties correctly recognize, victim impact evidence should generally be "limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family." State v. Nesbit, 978 S.W. 2d 872, 891 (Tenn. 1998) (citing Payne v. Tennessee, 501 U.S. 808, 822; Payne, 501 U.S. at 830, (O'Connor, J. concurring); Cargle v. State, 909 P.2d 806, 826 (Ok. Ct. Crim. App. 1995)). We must disagree with the Defendant's position that no such evidence was presented in this case. First, the victim's father provided the jury with a "brief glimpse" into his daughter's daily life. He described the rural setting where she and her family lived. The jury learned that the victim had a job painting small figurines at home which allowed her to also care for her two young children. The witness further testified that the victim's children were left alone at the time of the murder until he discovered them and took them to his own home. The jury heard that as a result of the victim's death, her father and mother adopted and continued to raise her children. Such evidence certainly touched on the circumstances surrounding the victim's death and its impact on her immediate family. The trial court did not err in instructing the jury accordingly.

XII. Instruction on Life Sentence

Shortly after the court completed its charge, the jury submitted a note with the following question:

> In the Questionnaire that we filled out as prospective jurors it stated a life sentence consisted of fifty-one years. As stated by you, our judge, on Thursday, October 3rd, 2002, a life sentence in the State of Tennessee was not fifty-one years, it had changed. Please review this law for us. Thank you, the jury.

The court declined the defense's suggestion that the jury be instructed on a Defendant's eligibility for parole under current law. Instead, the court reiterated its earlier remarks to the jury regarding the meaning of a life sentence. The court stated:

> Ladies and gentlemen of the jury: The question has been considered and let me reiterate what I had told you the other day when I brought to your attention that the Questionnaire was in error.
>
> I told you then and I tell you again, totally disregard that question of your understanding of what the law was, that it was a fifty-one, you had to build fifty-one years. That is to be totally disregarded, it is of no concern to you.
>
> When you stop and think for a moment of the many times that I have told you that your decision is based upon the evidence that you've heard and the law that I give you that applies to that evidence. You have not heard any evidence at all about what a life sentence is.
>
> You must think no more about this question. It is of no concern to you in your deliberations in this case. The issue in this case is whether or not a life sentence should be imposed or the death penalty. That's the issue. It's not a question of what is a life sentence.

The Defendant submits that in response to the jury's inquiry, the trial court erred in refusing to instruct the jury that "a Defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the Defendant has served at least twenty-five (25) full calendar years of such sentence." See Tenn. Code Ann. § 39-13-204(e)(2).

As noted, the offense in the present case was committed in December 1989. At that time, there were two sentencing options: life imprisonment and death. See Tenn. Code Ann. § 39-13-203 (1989). In 1993, the sentencing law was amended to provide for a sentence of life without the possibility of parole. The amended statute was made expressly applicable to offenses committed on or after July 1, 1993. See 1993 Tenn. Pub. Acts ch. 473, §16. Because the offense in this case was committed before the effective date of the amended statute, the trial court did not err in declining to instruct the jury regarding eligibility for parole under Tennessee Code Annotated section 39-13-204(e)(2).

Moreover, the trial court properly instructed the jury that the meaning of a life sentence should not be considered in its deliberations. State v. Bush, 942 S. W. 2d 489 (Tenn. 1997), is most instructive on this issue. In that case, shortly after deliberations began, the jury inquired of the trial court, "How many years does the [defendant] serve if he gets life imprisonment and how long before parole?" Id. at 502. The trial court declined the Defendant's request to instruct the jury as to the availability of parole. Instead, the court instructed the jury only that "parole eligibility is not an issue in a capital case. . . ." Id. at 503. On appeal, our supreme court rejected the defendant's due process

challenge to the trial court's instruction. In doing so, the court further stated, "[i]ndeed, the trial court's refusal to give defendant's requested response to the jury question was entirely consistent with prior decisions of this Court holding that the after-effect of a jury's verdict, such as parole availability, is not a proper instruction or consideration for the jury during deliberations." Id. (citing State v. Caughron, 855 S.W.2d 526, 543 (Tenn. 1993); State v. Payne, 791 S.W.2d 10, 21 (Tenn. 1990)). This issue is without merit.

XIII. Sequestration

During a recess after the close of the Defendant's proof, the following exchange took place:

> THE COURT: Is it all right for them to take Lynn Fillers [a juror] to the funeral home, which is, is it Manes?
> OFFICER BILLY WAYNE MOORE: Manes.
> THE COURT: While we're taking this recess?
> GEN. SCHMUTZER: The State has no objection.
> MR. OGLE: No problem, Judge.
> THE COURT: You're going to be taking him?
> OFFICER BILL WAYNE MOORE: Yes.
> THE COURT: I hate to rush him, but . . .

Following the recess, proceedings resumed in the presence of the jury. Before this Court, the Defendant concedes that the trial court permitted the juror to leave court without objection from either party. He asserts, however, that the State nonetheless has the burden of proving that the alleged separation did not prejudice the Defendant.

First, the Defendant has waived this issue by failing to object and in fact consenting to the juror's departure from court. See Tenn. R. App. P. 36(a). Considering this issue despite the apparent waiver, this Court concludes that the Defendant's argument is without merit. In his brief, the Defendant accurately set forth the law regarding jury separation:

> It is well-settled in Tennessee that once jury separation has been shown by the Defendant, the State then has the burden of showing that such separation did not result in prejudice against the Defendant. Gonzales v. State, 593 S.W.2d 288 (Tenn.1980). "'It is the opportunity of tampering with a juror, afforded by the separation which constitutes the ground for a new trial, but if such separation afforded no such opportunity, there can be no cause for a new trial.'" Gonzales, 593 S.W.2d at 291, quoting Cartwright v. State, 80 Tenn. 620 (1883). The burden is on the State to offer a satisfactory explanation as to why there was a jury separation and that the separated juror had no communications with others, or that if communications were had, they did not relate to the case at trial. Gonzales, 593 S.W.2d at 291-92.

State v. Spadafina, 952 S.W. 2d 444, 452 (Tenn. Crim. App. 1996). In arguing that the burden of persuasion is upon the state, the Defendant presumes that jury separation has in fact been established. "[A]t common law, the sequestration rule required that jurors be physically kept together within the presence of each other without food, drink, fire or light until a verdict was agreed upon." State v. Bondurant, 4 S.W. 3d 662, 671 (Tenn. 1999). "[U]nder modern law, the test of keeping a jury 'together' is not a literal one, requiring each juror to be at all times in the presence of all others. . . . The real test is whether a juror passes from the attendance and control of the court officer." Id. (citing State v. Bartlett, 407 A.2d 163, 166 (Vt.1979)). In the instant case, the record reflects only that the court allowed the juror to be escorted to a funeral home in the presence of a court officer. The Defendant does not allege and the record contains nothing to support a finding that the juror in question was ever outside the presence or control of the officer. We therefore conclude that the Defendant has failed at the outset to establish jury separation. It follows that the burden has not shifted to the state to prove a lack of prejudice to the Defendant based on the alleged separation. This issue is without merit.

XIV. Cumulative Effect of Errors

Upon due consideration, this court concludes that there was no error in the re-sentencing of the Defendant. There being no error, the Defendant cannot prevail on this issue.

XV. Proportionality Review

This Court is statutorily mandated to review the sentence of death to determine whether:

> (A) The sentence of death was imposed in any arbitrary fashion;
> (B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;
> (C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and
> (D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Tenn. Code Ann. § 39-13-206(c)(1); see also State v. Bland, 958 S.W. 2d 651, 661-74 (Tenn. 1997), cert. denied, 523 U.S. 1083, (1998).

We begin with the presumption that the sentence of death is proportional with the crime of first degree murder. See State v. Hall, 958 S.W. 2d 679, 699 (Tenn. 1997), cert. denied, 524 U.S. 941 (1998). If a case is "'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed,' then the sentence is disproportionate." State v. Keough, 18 S.W.3d 175, 183 (Tenn. 2000) (quoting State v. Bland, 958 S.W.2d at 668). In comparing this case to other cases in which the Defendant was convicted of the same or a similar crime, this court considers the facts and circumstances of the crime, the characteristics of the Defendant, and the aggravating and

mitigating circumstances involved. See Terry v. State, 46 S.W. 3d 147, 163-64 (Tenn. 2001), cert. denied, 534 U.S. 1023 (2001). Factors relevant to our review include: (1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims. See State v. Bland, 958 S.W. 2d 651, 667 (Tenn. 1997). Factors considered when comparing characteristics of defendants include: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of victim(s); and (8) the defendant's capacity for rehabilitation. Id.

In the present case, the victim, a mother of two young children, was shot in the head with a rifle at close range through the windshield of her car. She had been lured to the remote location under false pretenses. Medical evidence established that she was at least briefly aware of her plight as she attempted to shield herself with her hands. Premeditation was clearly present. The jury heard testimony that the Defendant, the victim's husband, attempted to solicit at least two other persons to kill her before he agreed to give Ralph Thompson a boat and truck to carry out the murder, and that he actively participated in formulating and carrying out the murder. The Defendant asked Thompson for a good location to get rid of his wife, and the location admittedly supplied by Thompson was the place where the victim was later killed. There was no apparent provocation or justification for the killing. The Defendant initially gave false statements to police denying any knowledge of or involvement in his wife's death. The jury heard no testimony regarding any showing of remorse by the Defendant for her murder with the possible exception of his callous remark that although he didn't love her, he was going to "miss the Bitch."

Evidence further showed that the Defendant is a white male with no prior criminal record and the only evidence of criminal activity was testimony tending to suggest thefts of personal items from his family members including a ring and a boat. Defense expert, Dr. Eric Engum, testified that the Defendant had above average intelligence but suffered from a constant low level of depression and a personality disorder. In mitigation, several witnesses testified to the Defendant's good character and behavior in prison and opined that the Defendant was an asset to the prison system. Witnesses further noted the Defendant's educational accomplishments in prison and his work ministering to and assisting other prisoners.

In undertaking our review, this Court is cognizant of the fact that "no two cases involve identical circumstances. . . ." See Terry, 46 S.W. 3d at 164. However, upon our review of the circumstances of the present case with those of similar cases, we conclude that the penalty death sentence imposed in this case is not disproportionate to the sentences imposed in similar cases. See, e.g., State v. Austin, 87 S.W. 3d 477 (Tenn. 2002), reh'g denied (Tenn. 2002), cert. denied, 538 U.S. 1001 (2003) (upholding death penalty on Defendant's conviction as an accessory before the fact to

first degree murder where the Defendant hired another to kill an undercover police officer who was to be the only witness against the Defendant in a pending criminal proceeding upon finding only the (i)(4) aggravating circumstance); State v. Stevens, 78 S.W.3d 817 (Tenn. 2002) (upholding death sentence where Defendant paid a teenager $5,000 to kill his wife and mother-in-law in an effort to avoid the financial hardships of divorce upon finding of (i)(4) aggravating circumstances; State v. Hutchison, 898 S.W. 2d 161 (Tenn. 1994) (upholding death sentence upon finding only the (i)(4) aggravating circumstance where Defendant was convicted of hiring another in the drowning death of the victim for insurance proceeds); State v. Porterfield and Owens, 746 S.W. 2d 441 (Tenn. 1988), reh'g denied (Tenn. 1988), cert. denied, 486 U.S. 1017 (1988) (upholding the sentences of death imposed on Sydney Porterfield and Gaile K. Owens for first degree murder and accessory before the fact to the first degree murder, respectively, in the murder-for-hire of Mrs. Owens' husband).

XVI. Jurisdiction

The Defendant asserts that the convicting court lacked jurisdiction to resentence him on his conviction for first degree murder because his case was never transferred or remanded in writing by the habeas corpus court to the convicting court after his life sentence was invalidated. Upon its determination that the life sentence was void, the Tennessee Supreme Court "remanded [the case] to the trial court for further proceedings." Stephenson, 28 S.W.3d at 912. The court's mandate was filed with the habeas corpus court, the Circuit Court for Johnson County, on October 17, 2000. On remand, on December 5, 2000, Judge Brown, Criminal Court Judge for Johnson County, entered an order providing as follows:

> In accordance with the opinion of the Tennessee Supreme Court . . . reversing both the opinion of the Court of Criminal Appeals and the judgment of this court denying the petition for writ of habeas corpus, the Supreme Court finding that the sentence of Jonathan Stephenson to life without parole upon his plea of guilty to murder in the first degree was illegal and void since that sentence did not exist as a possible punishment for first degree murder at the time of the offense,
>
> IT IS HEREBY ORDERED that the sentence of Jonathan Stephenson to life without parole is DECLARED NULL AND VOID. The Clerk shall forward a copy of this order to the petitioner; Kathy Morante, Deputy Attorney General; the Department of Correction; Circuit Court Clerk, Peggy Lane of Cocke County; and Al C. Schmutzer, Jr., District Attorney General of Cocke County. The costs in this cause are taxed to the state.

The Defendant previously objected to the jurisdiction of the Circuit Court for Cocke County to undertake further proceedings in this case absent an order of transfer or remand. This Court, in denying the Defendant's petition for writ of certiorari on this issue stated:

> Upon a judgment of conviction being declared null and void, the original court of conviction is, as a matter of law, invested with jurisdiction to take further

> appropriate action in a case. While we acknowledge that McLaney does provide that the habeas corpus court is to remand a case under such circumstances,[3] we view this as a means of providing notice to the convicting court and not necessarily as a means of conferring jurisdiction of the case to that court.

State v. Jonathan Wesley Stephenson, No. E2002-00713-CCA-WR-CO (Tenn. Crim. App., Knoxville, May 14, 2002) (order), application denied (Tenn. Sept. 16, 2002). See also, State v. Jonathan Wesley Stephenson, No. E2001-02672-CCA-R10-CO (Tenn. Crim. App., Knoxville, Nov. 9, 2001) (order denying application for extraordinary appeal on issue of authority of convicting court to resentence the Defendant), reh'g denied (Tenn. Crim. App. November 27, 2001), application denied (Tenn. Feb. 8, 2002).

On receiving notice that his life sentence was void, the Circuit Court for Cocke County as the court of conviction had jurisdiction to resentence the Defendant on his conviction for first degree murder. The authorities cited by the Defendant do not command a different result. This issue is without merit.

Conclusion

This court has conducted the statutorily mandated comparative proportionality review and concluded that the sentenced imposed in the Defendant's case is proportionate to the penalty imposed in similar cases. We have considered the entire record and conclude that the sentence of death was not imposed arbitrarily, that the evidence supports the jury's finding of the (i)(4) aggravating circumstance beyond a reasonable doubt, and that the evidence supports the jury's finding that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. In addition, we have reviewed each of the issues raised by the Defendant and have found no reversible error. Accordingly, we affirm the judgment sentencing the Defendant to death.

DAVID H. WELLES, JUDGE

[3] See McLaney v. Bell, 59 S.W. 3d 90 (Tenn. 2001). In support of this application, the Defendant relied on that portion of the opinion in which our supreme court stated that upon voiding a judgment, a habeas corpus court is required "to remand the case to the trial court . . . for further appropriate action." Id. at 95.